

-DECISION-

Claimant:
ELIZABETH R SCRIBNER

Decision No.: 259-BH-03

Date: January 31, 2003

Appeal No.: 0211205

Employer:
ANTHROPOLOGIE INC

S.S. No.:

L.O. No.: 61

Appellant: Claimant

Issue: Whether the claimant was able, available and actively seeking work within the meaning of the Maryland Code, Labor and Employment Article, Title 8 Section 903.

- NOTICE OF RIGHT OF APPEAL TO COURT -

You may file an appeal from this decision in the Circuit Court for Baltimore City or one of the Circuit Courts in a county in Maryland. The court rules about how to file the appeal can be found in many public libraries, in the *Maryland Rules of Procedure, Title 7, Chapter 200*.

The period for filing an appeal expires: March 02, 2003

- APPEARANCES -

FOR THE CLAIMANT:
Present
Attorney Mr. Ken Shiotani

AGENCY
Not Present

FOR THE EMPLOYER:
Not Present

EVALUATION OF THE EVIDENCE

The Board of Appeals has considered all of the evidence presented, including the testimony offered at the hearing. The Board has also considered all of the documentary evidence introduced in this case, as well as the Department of Labor, Licensing and Regulation's documents in the appeal file.

Neither the employer nor the Unemployment Insurance Agency ("the Agency") appeared at the hearing before the Board, although notice of the hearing was sent to their addresses of record and neither notice was returned.

The claimant has presented sufficient evidence to support her position that she is able, available and actively seeking work, within the meaning of LE, Section 8-903 of the Maryland Unemployment Insurance Law, despite the fact that she is only able to work and is only seeking part time employment. The claimant has presented substantial documentary evidence as well as testimony to support a conclusion that she is a "qualified individual with a disability" within the meaning of LE, Section 8-903(b). The claimant has also presented credible evidence that she had been making a reasonable search for work, within the limits of her disability and in light of her work history.

FINDINGS OF FACT

The claimant was employed by Anthropologie, Inc, a retail store, as a part time sales associate from September 21, 2001 until on or about February 26, 2002. At that time she was discharged¹ and she filed for unemployment insurance benefits with a benefit year beginning April 7, 2002. The Agency determined that she was not able and available for work and disqualified her for benefits beginning April 7, 2002. The claimant appealed that determination and after a hearing before a Hearing Examiner, the initial determination was affirmed. The claimant appealed to the Board.

The claimant receives Social Security Disability Benefits of \$716.00 per month due to a severe back injury. She also suffers from Dissociative Identity Disorder and Bipolar Disorder, two mental disabilities. As a result of these disabilities, the claimant's psychiatrist has limited her to work up to 20 hours per week. In addition, she cannot lift more than 10 lbs, due to her back injury.

Despite her disabilities the claimant obtained a part-time sales position with Anthropologie, Inc. working an average of 13 to 18 hours per week. Her work schedules varied and included both day and evening hours and weekends as well as weekdays. She placed no other restrictions² on her work other than the total number of hours a week. When the claimant was asked to work longer hours during the holiday shopping season, she did so, averaging 27 to 33 hours per week at that time.

¹ The reason for her discharge was adjudicated in a separate appeal (appeal no. 0211204) and is not a part of this case.

² Given the type of work that the claimant was seeking, the 10 lb. medical restriction does not appear to be of any consequence.

After the claimant lost her job with this employer and applied for unemployment insurance benefits, she sought part time work, within the restrictions placed on her by her psychiatrist. As before, she was able to work both day and evening hours, and weekends as well as weekdays. She sought and continues to seek work in the retail and restaurant industries, which is consistent with her work history. She also testified that there are part- time jobs available in those types of establishments.

CONCLUSIONS OF LAW

Section 8-903 provides that a claimant must be able to work available to work and actively seeking work in each week for which benefits are claimed.

L.E., Section 8-903 requires that in order to be eligible for benefits, a claimant must be able, available and actively seeking work. A claimant who is free to accept a full time job during the customary hours of that job is generally held to be available for work, within the meaning of the unemployment insurance law.

The statute does not specifically state that a claimant must be able and available for *full- time* work, but the Court of Appeals decision in **Robinson v. Maryland Emp. Sec. Bd.**, 202 Md. 515, 97 A.2d 300 (1953) has generally been interpreted to require full-time availability in order to be eligible for benefits. The claimant, in her supplemental memorandum, argues that the facts in **Robinson** are distinguishable from those in this case and further, that this interpretation needs to be revisited, in view of changes both in the unemployment law and in the workplace. The Board agrees.

First, there are some factual differences between this case and **Robinson**, although they alone would not be sufficient to conclude that **Robinson** is not pertinent. In **Robinson**, the claimant was not just restricting the *number* of hours she could work, but was also only willing to work from 11:00 am to 3:00 pm. In this case, the claimant was willing to work any hours and days, as long as they did not exceed 20 hours. Thus the claimant in **Robinson** was placing a much greater restriction on her availability and work search than the claimant in this case.

Second, not only have there been “major social and economic changes in the workplace and workforce” since **Robinson** was written, (see the Board decision **Donald E. Canneti**, 977-BH-02), but there have been significant changes in the law as well.

The Americans with Disabilities Act of 1990 (“ADA”), Title II states:

...[N]o qualified individual with a disability shall by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. 42 U.S.C. Section 12132.

To qualify as a disabled person under the ADA, an individual must have:

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

- (B) a record of such an impairment; or
 - (C) being regarded as having such an impairment.
- 42 U.S.C. Section 12102(2).

There is substantial evidence that the claimant qualifies as a disabled person under the ADA and the State of Maryland is clearly a public entity. The claimant argues that allowing her to seek part-time work is a reasonable modification as established by the ADA regulations:

A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program or activity. 28 CFR Section 35.130(b)(7).

Given the lack of a specific statutory requirement that one must be able and available for full-time work, and the express provisions of LE, Section 8-903(b) (see below), the Board concludes that allowing a claimant to receive unemployment benefits, who is limited to part-time work as a result of her disability and who is otherwise genuinely attached to the labor market and is actively seeking and willing to accept jobs that exist that accommodate her disability, would not “fundamentally alter the nature” of the unemployment insurance program. This conclusion is further bolstered by the fact that many other states allow benefits to part-time workers in certain circumstances; in fact at least eight states have statutory or regulatory provisions that allow benefits to claimants who are only seeking part time employment and only nine have statutes that specifically require full time availability to meet the able and available provisions of their law.³

Finally and most significantly, in 1993, Maryland unemployment law was amended with the inclusion of Section 8-903(b). That provision states:

(b) *Disability not a factor*: - The Secretary may not use the disability of a qualified individual with a disability as a factor in finding that an individual is not able to work under subsection (a)(1)(i) of this section.

The claimant is a qualified individual with a disability and is exactly the type of person this provision was enacted to protect. The legislative history provided by with the claimant’s memorandum of law makes that clear and shows that this change was also made to reflect the intention of the ADA.

.In conclusion, the Board finds that the claimant was making a reasonable search for work, given the limitations placed on her by her disability and her work history. Despite these limitations the claimant is able and available for work. To deny her benefits because her disability only allows her to work part-time would be a violation of LE, Section 8-903(b).

³ The Board specifically asked the claimant’s attorney to address whether or not part-time workers are eligible for unemployment insurance benefits in other states. The Board’s conclusions on this issue are based on information provided in the claimant’s supplemental memorandum of law.

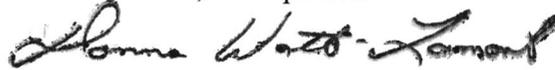
For all these reasons the decision of the Hearing Examiner is reversed.

DECISION

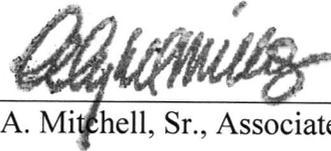
The claimant is able to work, available for work and actively seeking work within the meaning of Maryland Code Annotated, Labor and Employment Article, Title 8, Section 903. Benefits are allowed from the week beginning April 7, 2002, provided she is meeting the other requirements of the law..

The decision of the Hearing Examiner is reversed.

Hazel A. Warnick, Chairperson



Donna Watts-Lamont, Associate Member



Clayton A. Mitchell, Sr., Associate Member

Date of hearing: October 01, 2002

Copies mailed to:

ELIZABETH R. SCRIBNER

ANTHROPOLOGIE INC

KENNETH S. SHIOTANI, ESQ.

Michael Taylor, Agency Representative

UNEMPLOYMENT INSURANCE APPEALS DECISION

ELIZABETH R SCRIBNER

SSN #

Claimant

vs.

ANTHROPOLOGIE INC

Employer/Agency

Before the:

**Maryland Department of Labor,
Licensing and Regulation**

Division of Appeals

1100 North Eutaw Street

Room 511

Baltimore, MD 21201

(410) 767-2421

Appeal Number: 0211205

Appellant: Claimant

Local Office : 61 / COLLEGE PARK
CLAIM CENTER

June 28, 2002

For the Claimant : PRESENT , KENNETH S. SHIOTANI, ESQ.

For the Employer : PRESENT , PETER HILLIER

For the Agency:

ISSUE(S)

Whether the claimant is able, available for work and actively seeking work within the meaning of the MD Code Annotated, Labor and Employment Article, Title 8 Sections 903 and 904; and/or whether the claimant is entitled to sick claim benefits within the meaning of Section 8-907. Whether the appeal should be reopened pursuant to COMAR 09.32.06.02 N.

FINDINGS OF FACT

An appeal hearing was scheduled for the claimant and employer on May 24, 2002 at 1 pm at the South Office Building, second floor, Wheaton Plaza. The claimant appeared at the office on May 24, 2002 at 1:30 pm and was informed that the case had been dismissed. The claimant submitted a medical document (Claimant Exhibit No. 1) which indicated that she suffers from an acute episode of disassociation which led to her being unaware of the passage of time during the early afternoon.

The claimant filed a claim for unemployment insurance benefits effective April 7, 2002. The claimant had been employed by Anthropologie, Inc. from February 24, 2001 to February 26, 2002 as a sales associate.

The claimant has been seeking work in the printing and art field. For the claim week ending June 15, 2002, the claimant only made one job contact. Further, for claim week ending June 8, 2002, the claimant did not make any job contacts. The claimant submitted a medical document (Claimant Exhibit No. 1) which indicated that the claimant can work part time and the claimant cannot lift more than 10 pounds due to back surgery.

CONCLUSIONS OF LAW

COMAR 09.32.06.02M states that if a party appealing fails to appear at a hearing after having been given the required notice of the hearing, the hearing examiner may dismiss the appeal. Failure to be present at the location designated for the hearing within 10 minutes of the time scheduled is a failure to appear within the meaning of this section.

COMAR 09.32.06.02N(2) provides that a request for the reopening of a dismissed case may be granted for the following reasons:

- (a) The party received the hearing notice on or after the date of the hearing as a result of:
 - (i) an untimely or incorrect mailing of the hearing notice by the Appeals Division, or
 - (ii) a delay in the delivery of the hearing notice by the United States Postal Service;
- (b) An emergency or other unforeseen and unavoidable circumstance prevented a party from both attending the hearing and requesting a postponement of the hearing;
- (c) A party requested a postponement for the reasons listed above, but it was improperly denied.

COMAR 09.32.06.02N(3) provides that misreading of a properly prepared hearing notice as to the date, time, and place of the hearing is not good cause for reopening a dismissed case.

Md. Code Ann., Labor & Emp. Article, Section 8-903 (Supp. 1996) provides that a claimant for unemployment insurance benefits shall be (1) able to work (2) available for work; and (3) actively seeking work. In Robinson v. Maryland Employment Sec. Bd., 202 Md. 515, 97 A.2d 300 (1953), the Court of Appeals held that a claimant may not impose restrictions upon his or her willingness to work and still be available as the statute requires.

EVALUATION OF EVIDENCE

Since the claimant was late reporting for the appeal hearing scheduled for May 24, 2002 because she suffers from a disassociative identity disorder which causes her to be unaware of the passage of time, it will be held that there is good cause to reopen the dismissed case under the COMAR 09.32.06.02N.

Since the claimant submitted a medical document that she can do part-time work and has not been released for full time work, it will be held that the claimant is not able and available for work within the meaning of Section 8-903.

DECISION

The appealing party established compliance with the requirements of COMAR 09.32.06.02N in the above-captioned case. This case is reopened, allowing consideration of the substantive issues in the case.

IT IS HELD THAT the claimant is not fully able, available and actively seeking work within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-903 (Supp. 1996). Benefits are denied for the week beginning April 7, 2002 and until the claimant is fully able, available and actively seeking work without material restriction.

The determination of the Claim Specialist is affirmed.

M I Pazornick, Esq.
Hearing Examiner

Notice of Right to Request Waiver of Overpayment

The Department of Labor, Licensing and Regulation may seek recovery of any overpayment received by the Claimant. Pursuant to Section 8-809 of the Labor and Employment Article of the Annotated Code of Maryland, and Code of Maryland Regulations 09.32.07.01 through 09.32.07.09, the Claimant has a right to request a waiver of recovery of this overpayment. This request may be made by contacting Overpayment Recoveries Unit at 410-949-0022 or 1-800-827-4839. If this request is made, the Claimant is entitled to a hearing on this issue.

A request for waiver of recovery of overpayment does not act as an appeal of this decision.

Notice of Right to Petition for Review

Any party may request a review either in person, by facsimile or by mail with the Board of Appeals. Under COMAR 09.32.06.01A(1) appeals may not be filed by e-mail. Your appeal must be filed by July 15, 2002. You may file your request for further appeal in person at or by mail to the following address:

Board of Appeals
1100 North Eutaw Street

Room 515
Baltimore, Maryland 21201
Fax 410-767-2787

NOTE: Appeals filed by mail are considered timely on the date of the U.S. Postal Service postmark.

Date of hearing : June 20,2002
THJ/Specialist ID: WCP4H
Seq No: 002
Copies mailed on June 28, 2002 to:
ELIZABETH R. SCRIBNER
ANTHROPOLOGIE INC
LOCAL OFFICE #61
KENNETH S. SHIOTANI, ESQ.